MISCELLANY.

WORK OF THE COURT OF APPEALS.—The following is a statement of the work of the Court of Appeals for the November, January and March terms. The court adjourned on March 19 until June 2 at Wytheville :

Whole number of cases on docket	106
Final judgments, etc	95
Continued	10
Removed	1
	—106

SALE BY OFFICER OR STOCKHOLDER OF INFLUENCE IN CORPORATION.*—A seemingly lax view of the duty owed by the officers of a corporation to the stockholders and by the stockholders to each other is presented by a late decision in New York. The plaintiff contracted to buy part of the defendants' stock and to use his vote and influence to retain in office the existing board of directors, in consideration of the defendants' promise to procure for the plaintiff the position of cashier of the corporation for five years and to repurchase the stock at a stipulated price should he be sooner discharged. The plaintiff made the purchase and received the appointment, but was discharged before the time expired, and brought an action for the defendants' refusal to repurchase the stock. It was held, two justices dissenting, that the contract was not void as against public policy. *Bonta* v. *Gridley et al.*, 78 N. Y. Supp. 961 (App. Div. 4th Dept.).

This contract seems objectionable in that both parties gave up, for benefits to themselves as individuals, their independent judgment as stockholders regarding the election of officers, and in that the plaintiff also sold his influence as cashier. The general principle of law is, of course, that persons to whom the interests of others are committed, must act disinterestedly in behalf of the beneficiaries. *Oscanyan* v. *Arms Co.*, 103 U. S. 261. Officers of a corporation clearly fall within the scope of this principle. *Wardell* v. *U. P. R. R. Co.*, 103 U. S. 651, 658. Similarly, the community of interest subsisting between stockholders places each in a *quasi*-fiduciary relation to the others, and sound policy requires that each act *bona fide* for the prosperity of the corporation, uninfluenced by promises of personal reward. *Woodruff* v. *Wentworth*, 133 Mass. 309. Accordingly the principal case seems insupportable, and it is opposed to the weight of authority. *Guernsey* v. *Cook*, 120 Mass. 501; *Noel* v. *Drake*, 28 Kan. 265. How far these principles operate to restrain *bona fide* combinations among stockholders to influence corporate management where no such collateral inducements are present is an unsettled question. That understandings not having the force of contract may exist among them is undoubted. Most jurisdictions also allow actual contracts—of which voting trusts are the most common example—in which the parties are benefited not directly as individuals, but as stockholders. *Faulds* v. *Yates*, 57 Ill. 416; see Mor. Pri. Corp., 2d ed., sec. 477 n; 15 Harv. L. Rev. 756.

The court in the principal case suggests that there was no affirmative proof that the contract was made in bad faith or would be inimical to the interests of the corporation. It is submitted, however, that if transactions of the class to which this contract belongs are opposed to public policy, the courts, in a particular case,

*As to the validity of agreements to control the voting of corporate shares, see note 56, Am. St. Rep. 138-153.

should not inquire into the wisdom of the ultimate objects sought by such means. Moreover, if such inquiry were allowable, it would seem that the burden of upholding the contract should rest with the party claiming under it. *West* v. *Camden*, 135 U. S. 507, 514. The court also argues that a plaintiff who has himself performed should not be deprived of his remedy. This position apparently overlooks the fact that, in determining the validity of such contracts, the courts should consider not the equity of the transaction as between the parties, but the protection of corporate interests in general. Since they are illegal transactions, the plaintiff and the defendant are *in pari delicto*, and the law will leave the loss where it falls.—*Harvard Law Review.*

QUASI-ESTOPPEL BY VOID FOREIGN JUDGMENT OF DIVORCE.—This journal for July 1, 1901, contains an editorial, under the above title, which was prepared apropos of the decision of the Supreme Court, Appellate Division, Fourth Department, in *Re Swales* (60 App. Div. 599). We expressed approval of the doctrine of that case, and shortly thereafter we disapproved of the decision of the Appellate Division, Second Department, in *Starbuck* v. *Starbuck* (62 App. Div. 437), which laid down a contrary policy. Both of these cases have now been to the Court of Appeals. The *Swales* case was affirmed on the opinion below (172 N. Y. 651), and there is printed on the first page of this paper to-day the opinion of the Court of Appeals reversing the decision of the Appellate Division in *Starbuck* v. *Starbuck*. In our former comments we recognized that a possible distinction might be drawn between the *Swales* case and the *Starbuck* case, but we are glad that the Court of Appeals has taken the broad view that the two cases are controlled by a common principle which, for want of a better name, may be termed quasi-estoppel. The *Starbuck* case was an action for dower. It appeared that the plaintiff had been married to the decedent in whose real estate she now claims dower, and had thereafter procured an absolute divorce from him in the courts of Massachusetts, without, however, the acquirement of jurisdiction *in personam* of the defendant. Subsequently, the decedent married one of the defendants in the present action, in Pennsylvania, relying on the Massachusetts divorce. The court takes the view that the plaintiff will not be heard to question the validity of a divorce procured by herself, and that the Massachusetts decree, "if it had been received in evidence, would have operated to defeat her claim that she is now the widow of the decedent and entitled to dower in the real estate acquired by him after the decree." It may be noted in passing that this decision, in effect, overrules *Holmes* v. *Holmes* (4 Lans. 388, s. c., special term, 57 Barb. 305) and *Todd* v. *Kerr* (42 Barb. 317). Although these cases were direct actions for a second divorce by spouses who had procured a former divorce, instead of applications for administration or dower, it would seem that the rule laid down in the *Starbuck* case was intended to be of general application. The Court of Appeals says: "A party cannot avail himself of a defense or of a right to recovery by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor."

In our former comment on the *Swales* case we said: "The doctrine so laid down is not exactly that of estoppel, but one closely akin to it in principle and similar in result. The continuing importance of such doctrine lies in the fact that it might be invoked in cases where foreign divorces had been procured by plaintiffs who did not acquire *bona fide* domiciles in the State of the forum, so that the de-

cisions of the Federal Supreme Court in *Streitwolf* v. *Streitwolf* (181 U. S. 179) and *Bell* v. *Bell* (181 U. S. 175) would be controlling, and the divorce would not be valid here." The very recent decision of the Supreme Court of the United States in *Andrews* v. *Andrews*, 23 Sup. Ct. 237, commented upon in this journal for February 9, 1903, emphasizes still more forcibly the importance of the question of *bona fide* domicile of the plaintiff in a divorce suit. It is quite probable that the stringent policy as to domicile announced in *Andrews* v. *Andrews* will tend to discourage divorce pilgrimages. Nevertheless, one would be very sanguine who believed that large numbers of divorces would not still be granted upon domiciles acquired for divorce purposes only, and, furthermore, the question still remains open whether, even in a case of the acquirement by the plaintiff of a *bona fide* domicile in a State other than the original matrimonial domicile, a divorce would be good as against a defendant who was proceeded against merely by substituted service, and did not appear. On the whole, the outlook for uniformity of marital status throughout the Union is not at all hopeful, and consequently the position now taken by the New York Court of Appeals is eminently expedient and wise. If a wife has voluntarily procured a divorce from her husband, it would, in the language of the Appellate Division in the *Swales* case, amount to a "travesty of justice" if she were allowed to administer upon his estate or claim dower in his real property.—*New York Law Journal.*

CONSTITUTIONAL LAW—COMPELLING ONE TO BE A WITNESS AGAINST HIMSELF BY COMPELLING HIM TO EXHIBIT HIS PERSON FOR THE PURPOSE OF PROCURING EVIDENCE AGAINST HIM.—This interesting question, somewhat analogous to that so fully considered by Mr. Shastid, in his recent articles, 1 Mich. Law Rev. pp. 193, 297, was ably discussed in an exhaustive opinion of Mr. Justice McClain, of the Supreme Court of Iowa, in the late case of *State* v. *Height* (1902),—Iowa—, 91 N. W. Rep. 935. The defendant was charged with statutory assault upon a child, and upon the trial, physicians who had been enabled to make, against his will, an examination of his person while he was confined in jail, were permitted to testify over his objection that he was affected with a disease with which, it was claimed, the child was found to be infected after the alleged assault. There is not in the constitution of Iowa such a provision as is found in the federal and many state constitutions, that a person shall not be compelled to be a witness against himself. There is, however, the familiar provision that no person shall be deprived of life, liberty or property without due process of law, and the court held that the general principle finding expression in the maxim, *Nemo tenetur seipsum accusare*, had become so recognized and established in our law that, notwithstanding the absence of a constitutional declaration of this specific protection, it must be deemed to be secured under the requirement of due process of law. "We are convinced," said the court, "that the principle itself is too fundamental to have been purposely omitted from the charter of liberties of the people of Iowa, and that, had there been no such specific provision anywhere, the same result would have been reached under the general guaranty of due process of law." The court then proceeded to give illustrations of the application of the principle, saying: "A constitutional guaranty against self-criminating evidence does not make it unlawful to require defendant to uncover his face or hands, or take his feet from under a chair, in the court room, for purposes of identification. *State* v. *Prudhomme*, 25 La. Ann. 523; *Johnson* v. *Commonwealth*, 115 Pa. 369,

395, 9 Atl. 78; *State* v. *Garrett*, 71 N. C. 85, 17 Am. Rep. 1; *Myers* v. *State*, 97 Ga. 76, 99, 25 S. E. 252. Some courts have gone to the extent of receiving evidence obtained by compelling defendant to 'make tracks.' *State* v. *Graham*, 75 N. C. 256; *Walker* v. *State*, 7 Tex. App. 265, 32 Am. Rep. 595. Other courts have held such evidence inadmissible. *Stokes* v. *State*, 5 Baxt. (Tenn.), 619, 30 Am. Rep. 72; *Day* v. *State*, 63 Ga. 667; *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717; *People* v. *Mead*, 50 Mich. 228, 15 N. W. 95. And see *Jordan* v. *State*, 32 Miss. 382. This court has gone no further than to sustain the right to require defendant to stand up in court for the purpose of identification. *State* v. *Reasby*, 100 Iowa, 231, 69 N. W. 451. The only case sustaining the right to require disclosure of those parts of the person not usually exposed is that of *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, where it was held not improper to require the exposure of the forearm to discover tattoo marks for identification, and even in this case it is said that the accused should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. In *People* v. *McCoy*, 45 How. Prac. 216, it was held improper to receive evidence that a female defendant charged with the murder of a bastard child had, on a forcible examination of her person without her consent, been found to have been recently delivered of a child. *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717, is also in point to the effect that evidence derived from compulsory examination of the person is not admissible. The case of *People* v. *Glover*, 71 Mich. 303, 38 N. W. 874, relied on by the state, is not in point on this question, as defendant consented to the examination of his person, and voluntarily testified with reference to the subject. In *State* v. *Nordstrom*, 7 Wash. 506, 35 Pac. 382, it was held that an accused person 'cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of securing identification, or in other ways affording evidence against him.' It would seem, therefore, that such an investigation as that made in the case before us is without authority as against defendant's objection, and the receipt of the evidence was error, on the ground that it was the result of the invasion of defendant's constitutional right, impliedly guaranteed under the provision of our constitution as to due process of law, not to criminate himself."

The court further held that the proceeding was in violation of the constitutional provision securing to the people the right "to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches," and *Boyd* v. *United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746, was commented and relied upon, and *Newberry* v. *Carpenter*, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. Rep. 346, cited with reference to the effect of similar provisions in state constitutions. Proceeding, the court said: "There are, of course, limitations as to immunity from search and seizure for the purpose of securing evidence of crime. It is well settled that, when one charged with an offense is arrested, the officers may, without further legal procedure, seize weapons with which the crime has been committed, property which has been obtained by means of a criminal act, or articles which may give a clew to the commission of the crime or identification of the criminal. *Chastang* v. *State*, 83 Ala. 29, 3 South. 304; *Bank* v. *McLeod*, 65 Iowa 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; *Reifsnyder* v. *Lee*, 44 Iowa 101, 24 Am. Rep. 733. And the officer making such search may testify as to any facts, even though criminating, which were discovered

thereby. *Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940; *Shields* v. *State*, 104 Ala. 35, 16 South. 85, 53 Am. St. Rep. 17; *State* v. *Flynn*, 36 N. H. 64. But 'a party to a suit can gain nothing by virtue of violence under the pretense of process, nor will a fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence or abuse of legal process.' *Reifsnyder* v. *Lee*, *supra* . . . None of the exceptions recognized cover such a case as we have before us. The search was for the mere purpose of securing evidence by an invasion of the private person of the defendant, and we think there is no consideration whatever which will justify it."*—*Michigan Law Journal.*

TRAVELERS' WILLS—CONDITIONS—"IF I DO NOT RETURN," ETC.†—A contingent will is one which is only to take effect upon condition, or if certain circumstances happen. If the event mentioned as a contingency never happens the will is void. The most usual condition in this class of wills is the uncertainty of a testator's arrival or return from a journey or of his safety during some perilous undertaking into which he is about to enter. While there has been much discussion as to what should be the attitude of the courts toward such wills, we have no hesitation in saying that the better rule is the one which, recognizing the evident desire of the testator not to die intestate, inclines the mind of the court to consider the condition mentioned more as an inducement which led the testator to make the will, rather than a will which was only to be effective if the conditional event specified happened. On this point the language of the court in the case of *Thompson* v. *Connor*, 3 Bradf. (N. Y.) 366, is very pertinent: "To make a testament strictly depends upon a condition so as to affect the question of probate, the intention ought to appear very clearly that the will should not take effect except upon the prescribed contingency. The mere factum of the instrument implies generally an intention not to die intestate—a determination to give and bequeath."

The following cases have held the phrases constituting the alleged conditions upon which the wills offered for probate in the several instances were to be effective, to be in reality mere statements of the reason which induced the testator to make his will at the particular time that he did. In the case of *Damon* v. *Damon*, 90 Mass. (8 Allen) 192, a testator commenced his will as follows: "I, A B, being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: First, if by casualty or otherwise, I shall lose my life during this voyage, I give and bequeath to my wife," etc., and afterward gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned in safety, and afterward died. The court held that this was not a contingent will, and was therefore entitled to probate. The court held, however, that the condition in this case, following the word "First," applied solely to the first devise and made that alone conditional. To same effect: *Urey's Admr.* v. *Urey's Extx.*, 86 Ky. 354, 5 S. W. 859.

In *Kelleher* v. *Kernan*, 60 Md. 440, the will offered for probate was as follows: "In anticipation of my departure from the city of Baltimore, and to provide for possible contingencies, I hereby give," etc. The testator made the expected trip,

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*See *ante*, p. 772.

†See Eaton *v.* Brown, Ct. of Appeals, District Columbia, 3 Wash. Law Rep. 746; Skipwith *v.* Cabell, 19 Gratt. 782.

returned safely, and died shortly afterward. The court held the will entitled to probate. The court said: "The fact in the present case, that the maker was about taking a trip away, induced him to make the paper then; but because he states his reason, viz, that it was in anticipation of the trip that he makes the provision against the 'possible contingencies' does not warrant us in holding that the will was wholly contingent in respect to its operation, and that because he did not die during that trip, but returned and died afterward at home, leaving this paper uncancelled, it can have no operation."

A case very much like the one just cited is that of *Tarver* v. *Tarver*, 9 Pet. (U. S.) 174, where the testator prefaced his disposition by saying, "Being about to take a long journey, and knowing the uncertainty of life, I deem it advisable to make a will," which will was held not to be contingent.

Phrases such as this are of course plainly only a matter of inducement, inviting the testator to make his will at that time. When the word "if" is used, however, the construction of the testator's intention becomes more doubtful. Still, even in this case, decisions have held that the use of this word does not always prove that the testator only meant for his will to become effective on the happening of the contingency mentioned. Thus, in the case of *French* v. *French*, 14 W. Va. 459, the will was in these words: "Let all men know hereby, if I get drowned this morning, March 7, 1882, that I bequeath all my property, personal and real, to," etc. The paper was given to his wife when he started. He returned safely and died afterwards, leaving this paper still in his wife's possession, which was, by the decision of the majority of the court, sustained as a valid unconditional will. The decision in this case has been sometimes questioned.

In this case of *Cody* v. *Conly*, 27 Gratt. (Va.) 313, the clause alleged to be conditional was: "I am going away; I may never return. I leave," etc. The testator in this case never left home; nevertheless, the court held the will to be valid and unconditional. In *Berton* v. *Collingwood*, 4 Hag. 176, the will began, "Lest I die before the next sun, I make," etc. Held not contingent. A will commencing, "In case of sudden or unexpected death, I give," etc., was held not conditional. See, also, case of *Ex parte Lindeny*, 2 Bradf. (N. Y.) 204, where the will commenced: "We go on board to-morrow. If anything happens to us on the way," etc. The will was held not conditional. The decision is rather doubtful on principle.

A very strong case is that of *Likefield* v. *Likefield*, 82 Ky. 589. The will in this case commenced as follows: "If any accident should happen to me that I die from home, I give," etc. The maker died at home; nevertheless, the court held that the dying of the testator from home was not a condition precedent to give effect to the will, the words first stated being only words of inducement to the making of the will. This case makes a distinction not often recognized. After citing a number of authorities, holding a will contingent where it specifies death on a particular journey, or in a particular undertaking as an event effectuating the will, the court says: "It will be noticed in all the above cases where the will has been held to be conditional, that a *specific* contingency is named, and it either confined to a *time* certain, or a particular *event*. In this respect they are clearly distinguishable from the case now presented. The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. It refers to no particular expected calamity, and the words are *general* in their character;

and this fact leads us to the conclusion that the testator did not intend the disposition of his estate to depend upon whether he died *at* or *away* from his home." This case is sustained by several English authorities. In the following cases general conditions were expressed, as "in case I should die on my travels," *Strauss* v. *Schmidt*, 3 Phill. 209; "if I should die during my absence from home," *In re Tylden*, 18 Jurist. 136; "in case of any fatal accident happening to me, being about to travel by railway," *In re Dobson*, 1 Eng. Law Rep. 88; "in the event of any accident happening to me," *Thorne's Case*, 4 Sw. & Tr. In all these cases the wills were held not contingent.

The cases which have held clauses embodying a condition to make the wills contingent on the happening of the event specified are numerous, but will be found to be in the majority of cases confined to those phrases which commence with the word "if" or some similar word, and referring to some particular journey or some particular time. Thus phrases, such as these, "if I never get back," referring to a particular journey, or "should anything happen to me," referring to a particlar time, have been held to make the taking effect of the will dependent on the happening of the condition mentioned. Cases construing such instances are as follows: *Maxwell* v. *Maxwell*, 60 Ky. (3 Mete.) 101; *Wagner* v. *McDonald*, 2 Har. & J. (Md.) 346; *Magee* v. *McNeil*, 41 Miss. 17; *Todd's Will*, 2 W. & S. (Pa.) 145; *Dougherty* v. *Dougherty*, 61 Ky. (4 Metc.) 25; *Morrow's Appeal*, 116 Pa. St. 440, 9 Atl. 660.—*Central Law Journal.*

How Far Mortgagor Who Has Transferred His Equity of Redemption is a Mere Surety.—When a mortgagor conveys the mortgaged property, his grantee is evidently brought into connection in some way with the mortgage transaction. How far this threefold relation of mortgagee, grantee, and mortgagor is analogous to that of creditor, principal and surety, and governed by the principles of suretyship, is a question that has frequently arisen in one form or another. Whether the mortgagor becomes a surety so far as his rights against the mortgagee are concerned is perhaps the most disputed point of all and has been considered with especial care by the courts of New York, which have taken the lead in asserting the existence of such a relation. The recent case of *Gottschalk* v. *Jungmann* (1903), 79 N. Y. Supp. 551, has some interest therefore as showing the completeness with which this doctrine is being developed in New York.

The first cases on this subject arose where the purchaser of the property also contracted to assume the mortgage debt. As between the purchaser and the mortgagor, the court had no trouble in finding the relation of principal and surety. The mortgagor was entitled in equity as against the purchaser to have the debt satisfied in the first place out of the property conveyed; or, if he paid the debt himself he was subrogated to the mortgage security. *Halsey* v. *Reed* (1842), 9 Paige, 446. But as against the mortgagee he was not yet regarded as a surety and could not file a bill to compel him to proceed in the first instance against the purchaser. *Marsh* v. *Pike* (1843), 1 Sandf. Ch. 210, affirmed in (1844) 10 Paige, 595. This continued to be the generally accepted view, apparently, as late as *Meyer* v. *Lathrop* (1877), 10 Hun. 66, where it was held that giving a binding extension of time to the purchaser did not discharge the mortgagor. *Calvo* v. *Davies* (1878), 73 N. Y. 211, seems to have been the first case in the highest court in which the contrary doctrine was definitely maintained and such an extension held to dis-

charge a mortgagor as it would any surety. The same principle was applied in *Paine* v. *Jones* (1879), 76 N. Y. 274, when there was an alteration of the terms of the mortgage, and in *Russell* v. *Weinberg* (1878), 4 Abb. N. C. 139, where there was a failure to comply with a request to foreclose and a depreciation of the property and the mortgagor as surety was held to be discharged *pro tanto* under the familiar New York rule as laid down in *Pain* v. *Packard* (1815), 13 Johns. 173. A further and important advance was made in *Murray* v. *Marshall* (1884), 94 N. Y. 611. There, unlike the foregoing cases, the purchaser did not assume the debt, but nevertheless the mortgagor was regarded as a surety to the extent of the value of the land and was entirely discharged by an extension of the mortgage, the land being sufficient to pay the debt. So in *Osborne* v. *Hayward* (1899), 40 App. Div. 78, the doctrine of *Pain* v. *Packard* applied to a case where the conveyance of the property was without assumption of the debt. The present case of *Gottschalk* v. *Jungmann* differed from *Osborne* v. *Heyward* in only one respect. The injury to the mortgagor, instead of consisting in the depreciation of the property, lay in the fact that the mortgagee, by failing to foreclose on request, allowed taxes, water rates, and interest to accumulate, as well as rent to be received by the grantee of the premises. It was held that the mortgagee was responsible for the amount by which the available proceeds of the sale were diminished by reason of the incumbrances and the mortgagor was released to that extent. Concerning the rents the court was divided on the question as to whether under the circumstances the mortgagee was bound in due diligence to impound the rents by having a receiver appointed, a majority holding that he was not.

The New York courts have thus step by step assimilated the position of a mortgagor who has parted with the land to that of a surety until now it may be said that he is equally protected against impairment of his rights by act of his creditor. If the purchaser of the land has assumed the debt, the protection extends to the amount of the debt, otherwise only to the value of the land. *Matter of Pisa* (1896), 5 App. Div. 181. This rule is derived from the principle that the mortgagor, having the right to pay the debt and recover the amount from the person who has contracted to pay it or from the land which in equity is primarily liable for it, *Johnson* v. *Zink* (1873), 51 N. Y. 333, is discharged by any act of the mortgagee which interferes with the exercise of such right. The same view has been adopted elsewhere especially in case of assumption of the debt by the purchaser. *George* v. *Andrews* (1882), 60 Md. 26; *Pratt* v. *Conway* (1899), 148 Mo. 291; *Herd* v. *Tuohy* (1901), 133 Cal. 55; but also where there was no assumption, *Travers* v. *Dorr* (1895), 60 Minn. 173; *Bunnell* v. *Carter* (1896), 14 Utah, 100; but *Chilton* v. *Brooks* (1890), 72 Md. 554, is *contra*. Many courts, however, refuse to recognize that as against the mortgagee the mortgagor has any of a surety's rights, their theory being that the sale of the property is a transaction to which the mortgagee is not a party and which therefore cannot affect his position or compel him to treat his former principal debtor as having become a surety, unless there is a novation. *Denison University* v. *Manning* (1901), 65 Ohio St. 138, criticized in 2 Columbia Law Rev. 123. A similar result was reached in *Fish* v. *Glover* (1894), 154 Ill. 86, where a statute providing for the discharge of a surety on the creditor's failure to sue on request was held inapplicable to such a case. These decisions, however, lose sight of the fact that the rights of indemnity and subrogation and the doctrine that a surety is discharged if they are violated by the creditor, are of equitable

origin, and should therefore be determined according to the actual relations of the parties and not according to the technical form of the contract. If the mortgagor has a right to be secured by the land he has conveyed, and the mortgagee knows this, it is hard to see why he should not be bound to respect it. Perhaps a feeling that there is a certain hardship in the strictness with which a creditor is bound to respect a surety's interests has had weight in inducing some courts to reject the New York doctrine.

If the mortgagor's position is practically that of a surety, there is no reason why the rule laid down in *Pain* v. *Packard* should not apply to such a case as *Gottschalk* v. *Jungmann*, just as was done in *Colgrove* v. *Tallmann* (1876), 67 N. Y. 95, where the suretyship was merely implied from the relation of partnership. And on principle the extension of the rule to cover cases of impairment of the mortgage security by allowing the creation of subsequent incumbrances seems correct, as the injury to the surety from the creditor's failure to sue as required is the basis of his release from liability, *King* v. *Baldwin* (1819), 17 Johns. 384, 390, and any injury resulting from such failure should therefore be sufficient.—*Columbia Law Review.*

PUNISHMENT FOR RAPE.—We are indebted to Dr. B. W. Green, formerly a surgeon in the Confederate States navy, and subsequently for many years a resident of the Argentine Republic, but now resident at the University of Virginia, for the following notes on this subject:

Rape is such a brutal crime, and is looked upon with such horror, that it has from ancient times been dealt with under the severest penalties. Castration, long imprisonment, imprisonment for life, and death. It often happens that people are so intolerant of the crime that they are not willing to await the slow action of the law, but take the matter in hand themselves and kill the offender as soon as he can be caught. Resentment at the crime, and knowledge that the woman who has been the sufferer at the hands of the sensual brute will have to be subjected to a cross-examination before the court, and tell before the bystanders every detail of the horrors that she has undergone, justify the action in their minds, and cut short all proceedings of courts, by a speedy end of the case.

To go back to the times of William I, who was King of England from 1066 to 1087: In speaking of him, the writer in the *Saxon Chronicle*, under date of 1086, says: "Amongst other things the good order that William established is not to be forgotten; it was such that any man, who was himself aught, might travel over the kingdom with a bosom-full of gold unmolested; and no man durst kill another, however great the injury he might have received from him. *And gif hwilc carl man haemde with wimman hire unthances, sona he for leas tha limu the he mid pleagode.*" [If any man lay with a woman, she unwilling, he soon lost the limb with which he played.] Saxon Chronicles, edited by John Earle, M. A. Oxford, 1865, p. 222 ll. 2-8.

This becomes more interesting by another reference: "*De muliere vi compressa & pudicitia luctamine tentata: Qui foeminam vi compresserit, forisfacit membra sua. Qui prostraverit foeminam ad terram & ei vim inferat, mulcta ejus Domino est X solidi. Si vero eam compresserit, forisfacit membra.*" This in the Norman French, the language of the courts of that day, is: "*Ki purgist femme per forze forfait ad*

les membres, ki abate femme a terre, pur faire lui force, la multe al Seignur X solz, s'el la purgiste, forfait est de membres."* The English of that is: "Whoever shall forcibly defile a woman, shall be punished by loss of his Members; and whoever throws a Woman on the Ground, with an Intent to violate her, the Mulct to the Lord is 10s. But if he defiled her, he forfeits his Members."

Virginians were early brought face to face with the problem of managing the negro, that came as a savage to take the place of the indented white servant who was not as valuable in the cultivation of tobacco as the negro. When they came in large numbers it was necessary to enact special laws for their governance.

Act of October, 1748, 22d George II:

"XXIV. And that where any slave shall be notoriously guilty of going abroad in the night, or running away, and laying out, and cannot be reclaimed from such disorderly courses by the common methods of punishment, it shall be lawful for the county court, upon complaint, and proof thereof to them made, by the owner of such slave, to order and direct such punishment, by dismembering, or any other way, not touching life, as such court shall think fit. . . . ."—Hening Statutes, Vol. VI, p. 111.

Extract from Augusta County Records:

"May 21, 1756.—On motion of Thomas Lewis, Gent., setting forth that his negro, Hampton, frequently absconds from his service, and that he has several times attempted to ravish Ann West and other white women, praying, to prevent the like mischief, he may be dismembered; it is ordered that the said Lewis employ such skillful person, as he may think proper, to castrate the said slave."—History of Augusta County, Virginia; by J. Lewis Peyton. Staunton: 1882.

Act of November, 1769, 10th George III:

"Chap. XIX. Whereas by an act of the General Assembly, made in the twenty-second year of his late majesty George the second, intituled An Act directing the trial of slaves committing capital crimes, and for the more effectual punishing conspiracies and insurrections of them, and for the better government of negroes, mulatoes, and Indians, bond or free, the county courts within this dominion are impowered to punish outlying slaves who cannot be reclaimed, by dismembering such slaves, which punishment is often disproportioned to the offence, and contrary to the principles of humanity. Be it therefore enacted, by the Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted by the authority of the same, That it shall not be lawful for any county court to order and direct castration of any slave, except such slave shall be convicted of an attempt to ravish a white woman, in which case they may inflict such punishment; any thing in the said recited act, to the contrary, notwithstanding."—Hen. Stat., Vol. VIII, p. 358. Richmond: 1821.

Act of 1792:

"XVIII. It shall not be lawful for any County or Corporation Court to order and direct castration of any slave except such slave shall be convicted of an

* "*Forfait est de Membres.* Under our Saxon kings, the punishment of Rape was only pecuniary, and the only express Laws on this head are those of Aethelb., p. 7, LXXXI—Alfr. p. 40. XXV, and Canute, p. XLIX." Robert Kelham, of Lincoln's Inn, London, 1779. A Dictionary of the Norman or Old French Language. To which are added the Laws of William the Conqueror, pp. 36-37. Appendix.

attempt to ravish a white woman, in which case they may inflict such punishment."—A Collection of All Such Laws of the General Assembly of Virginia as are Now in Force. Richmond: 1794.

Act of February 8, 1819:

"4. If any slave shall attempt to ravish a white woman, and be thereof lawfully convicted, he shall be adjudged a felon, and may be punished with castration.

"5. All and every statute and statutes, within the purview of this act, shall be and the same are hereby repealed: Provided always, That nothing in this act contained shall be construed to repeal any statute or statutes, for so much thereof as relates to any offence within the purview thereof, committed or done before the commencement of this act.

"6. This commence and be in force from and after the first day of January, eighteen hundred and twenty."*

There is a tradition that about the first of the last century Dr. Lemon, of Williamsburg, was carried "over the river," that is, to Isle of Wight or Surry, to castrate a negro who had ravished a white woman. No other case is remembered from then until the negroes were freed from the rule of their masters. All remember the faithful discharge of their duties, and the protection of the women and children when the men were away in 1861–1865. Those same old negroes are still worthy of the confidence, and have it, of all the people. It is the negro who has been born since the war—the negro with the pencil behind his ear and a school-book in his hand—who has reverted to barbarism, and is guilty of this savagery. When negroes first came to Virginia they were savages, and it took two hundred years to bring them to what they were in 1860.

Many thinking people of the South believe that a return to the old methods of punishment will have the same good effect. These believe that half a dozen castrated negroes going about in a community would have better effect than hanging five hundred.

A few years ago a negro was executed in Loudoun county for ravishing a white woman. He had been tried twice for the same offence. The first time it was a negro woman who had been his victim. He was convicted and sent to the penitentiary for a short term. He was tried a second time, and again a negress was his victim. The jury were not satisfied of his guilt, and he was discharged. He finally ravished a white woman, and on being accused fled, but was hunted for several days, and was finally captured, tried and convicted. Before the day of execution he made a confession, declaring himself guilty of all three of the offenses, and said that he had assaulted another white woman whom he had seen afterwards, but who was afraid to make any complaint, as she dreaded the publicity and shame of a public trial.

Hanging certainly does not seem to have a deterrent effect. But a castrated negro would be an object of derision to all the negro men and boys, and particularly to the women. It would not interfere with his usefulness as a working animal. Geldings and oxen are as valuable as entire animals.

This is certainly better than lynching, and more effective.

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* From 1769, c. 19, sec. 1; Chan. Rev., p. 9; 1804, c. 5, sec. 11; ed. 1808, c. 55, sec. 11; 1748, ed. 1752, c. 38, sec. 25; and ed. 1769, c. 31, sec. 25; Code of Virginia 1819, Vol. I, p. 585-586. Richmond: 1819.